Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-578

LARRY LEE BRANNON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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The decision below conflicts with prior applicable decisions of this Court where this Court has consistently held that a conviction based upon a record which is void as to any relevant evidence of a material element of the offense charged is violative of due process of law.

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PETITION

The petitioner, LARRY LEE BRANNON, respectfully prays that a writ of certiorari issue to review the decision, judgment, and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 29, 1976, Petition for Rehearing denied August 23, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Northern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 29, 1976. A timely petition for rehearing was denied on August 23, 1976, and this petition for Writ of Certiorari was filed more than thirty (30) days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether petitioner's liberty was deprived without due process of law where there was *no* evidence of guilt to convict him of either conspiracy to distribute and distributing a controlled substance.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was indicted for and convicted of a conspiracy to possess with intent to distribute and the intentional distribution of methaqualone, a controlled substance 21 U.S.C.A. §841(a)(1), 846. A co-defendant was similarly charged and convicted (R. 1, 275, 277).

A DEA agent visited the co-defendant and sought to purchase methaqualone. The co-defendant dialed an unknown telephone number and asked, "Isn't this Larry Brannon's phone number?" The co-defendant said, "I'm interested in half a pound and I would like to pick it up around eight p.m." (R. 53-55)

The petitioner lived in a rooming house in which there were five other occupied apartments in addition to the room occupied by the petitioner. There were only two telephones in the rooming house in which petitioner lived. (R. 155-156, 183)

Two agents followed the co-defendant to the rooming house and with one pair of binoculars between them observed the co-defendant enter petitioner's room. One agent saw petitioner get a plastic bag. She observed something being exchanged between the petitioner and the co-defendant, but she could not see the item that was exchanged, nor could she see anything pass between petitioner and the co-

defendant. The co-defendant was in the house from seven-fifty to eight-thirty p.m. but was only observed for approximately ten minutes. (R. 131-142)

The other agent also saw a plastic bag but he had not seen nor could he tell the contents of the bag nor its texture. He did not see nor could he say what was handed from one to the other. (R. 143-152)

When the DEA agent purchased the methaqualone from the co-defendant the controlled substance was in an empty candy box, Old Fashioned Sugar Lumps. The methaqualone received by the DEA agent from the co-defendant was never identified by any government witness as being supplied by the petitioner. (R. 53, 168)

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with prior applicable decisions of this Court where this Court has consistently held that a conviction based upon a record which is void as to any relevant evidence of a material element of the offense charged is violative of due process of law. The appellate court, in its opinion, treated the evidence contained in the record as circumstantial and applied the normal circumstantial evidence rule.

However, the petitioner's attack upon the conviction was validly based upon this Court's decisions in *Thompson v. Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157; *Vachon v. New Hampshire*, 414 U.S. 178 (1974).

In determining that there was sufficient circumstantial evidence to support a jury verdict, the decision sub

judice misconstrued, misconceived the applicable decisions of this Court. *Upshaw v. United States*, 335 U.S. 410 (1948).

The Record below clearly demonstrates that the petitioner did not agree or conspire with the co-defendant and did not deliver or agree to deliver a controlled substance to the co-defendant, a material omission.

In our concept of criminal jurisprudence, guilt is personal and when one's conviction can only be justified by reference to the admittedly criminal conduct of another, and that relationship is unsubstantial and does not satisfy the concept of personal guilt, the conviction must fall. See *Scales v. United States*, 367 U.S. 203 (1961).

In its decision, the Fifth Circuit has ignored this concept of personal guilt and has approved a jury verdict when the cause never should have been submitted to a jury, as to petitioner. There was no evidence as to the material elements of knowledge or delivery of the offense charged. There was no evidence that petitioner agreed to supply or did supply the methaqualone to the co-defendant, *Harris v. United States*, 404 U.S. 1232 (1971).

Thus, the Fifth Circuit has ignored this Court's admonition that,

> "[J]ust as a 'conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

Thompson, supra; *Johnson v. Florida*, 391 U.S. 596 (1968).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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By_____
HAROLD MENDELOW
of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the U.S. Attorney's Office, NICKOLAS P. GEEKER, ESQUIRE, Northern District of Florida, Post Office Box 1308, Tallahassee, Florida 32301; and to the Honorable ROBERT BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20503, this ____ day of October, 1976.

_____
HAROLD MENDELOW
of Counsel

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1332
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

LARRY LEE BRANNON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(July 29, 1976)

Before AINSWORTH, CLARK and RONEY,
Circuit Judges.

PER CURIAM:

Defendant was convicted by a jury of conspiracy to possess with intent to distribute and intentional distribution of methaqualone, a controlled substance. 21 U.S.C.A. §§841(a)(1), 846. The sole argument advanced on this appeal is that the trial court erred in denying defendant's motion for judgment of acquittal because there is no evidence that defendant distributed or conspired to distribute the drug.

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

In reviewing the evidence upon which a jury based its verdict of guilty, the Court examines the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942). When the conviction is based on circumstantial evidence, as is the case here, the question becomes whether the jury could reasonably conclude that the evidence excluded all reasonable hypotheses of innocence. United States v. Gomez-Rojas, 507 F.2d 1213, 1221 (5th Cir. 1975), cert. denied, ___ U.S. ___ (1976; United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1974). The standard for appellate review of conspiracy cases is whether the evidence sufficiently connected a particular defendant with the alleged conspiracy, once the existence of an agreement or common scheme of conspiracy is shown. United States v. Reynolds, 511 F.2d 603, 607 (5th Cir. 1975); United States v. Sanchez, 508 F.2d 388, 392 (5th Cir. 1975), cert. denied, ___ U.S. ___ (1976); United States v. Warner, 441 F.2d 821, 830 (5th Cir. 1971), cert. denied, 404 U.S. 829 (1972).

The record reveals that when DEA agents were arranging for a drug purchase with appellant Brannon's co-defendant, the co-defendant dialed a wrong number, and asked the answering party, "Isn't this Larry Brannon's phone number?" The co-defendant then redialed, and set a time for picking up the drug. At approximately the appointed hour the co-defendant was observed entering the Brannon residence and receiving a bag from Brannon. Co-defendant's car was then observed driving directly from Brannon's home to the delivery point. We can only conclude that this evidence could reasonably exclude any reasonable hypothesis of innocence in the view of the jury.

AFFIRMED.